In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-15

EDWARD E. REICIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction is invalid because the jury may have predicated its verdict upon an improper theory of guilt, and that his proffer of expert medical testimony was improperly denied.

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of an eleven-count indictment charging fraudulent use of the mails, in violation of 18 U.S.C. 1341. He was acquitted on the ten remaining counts. Petitioner was sentenced to a term of eighteen months' imprisonment. The court of appeals affirmed (Pet. App. 1-28; 497 F. 2d 563).

The facts may be summarized as follows: The government charged that petitioner, an attorney, together with Dr. William Becker, had devised and executed a scheme to defraud insurance companies in personal injury cases by falsifying medical reports, inflating charges, and causing claimants to increase their claimed damages by remaining away from work.[1]

The count on which petitioner was convicted concerned the claim of Philip Eauslin, a salesman whose automobile was involved in a collision with a truck on July 5, 1967. After the accident, Eauslin experienced a recurrence of a back pain which had bothered him sporadically for some years. Petitioner suggested that Eauslin see a doctor and arranged an appointment with Dr. Becker. Eauslin saw Dr. Becker once, during which time the doctor examined him briefly and referred him to an x-ray clinic but provided him with no treatment or medication. Dr. Becker's records, however, reflected eleven visits by Eauslin, for which the total charge was $185. Becker refunded one-fourth of this amount to petitioner in cash (Pet. App. 3-5).

1. Petitioner contends that the count on which he was convicted was improperly submitted to the jury on alternative theories of guilt. The indictment charged petitioner

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[1]Becker, who was convicted of mail fraud prior to petitioner's trial, testified for the government. According to Becker, petitioner would refer personal injury claimants to Becker, and Becker would falsify and exaggerate his medical reports, with petitioner's knowledge. Becker then billed petitioner for the medical services. Petitioner would either pay a portion of the bill, or (after petitioner became concerned that the practice would be discovered) petitioner would pay the face amount of the bill and receive a cash kickback from Becker.

and Becker with numerous actions in furtherance of their scheme, including the representation and examination of claimants, the rendering of excessive charges for medical treatment, and the forwarding of fraudulent claims to insurance companies. The defendants were also charged with having caused claimants "to absent themselves from employment to increase their alleged damages" (Pet. App. 25-27).

In connection with the Eauslin claim, there was ample evidence that petitioner had used the mails to send a false medical report and a false bill to an insurance company in furtherance of a scheme to defraud. There was, however, no evidence that Eauslin had been induced to take unnecessary time off from work (Pet. App. 9).

The jury was instructed that the government need not prove each representation charged in the indictment (Pet. App. 11, n. 7). Petitioner, relying primarily upon *Stromberg* v. *California,* 283 U.S. 359, and *United States* v. *Groves,* 122 F. 2d 87 (C.A. 2), contends that this constituted a presentation of the case to the jury on alternative theories, of which one was invalid, and that conviction upon a general verdict of guilt therefore cannot be sustained.

Stromberg and *Groves*, however, are inapposite. The instant case does not involve separate offenses or separate legal theories. Rather, the indictment charged a single, unitary scheme to defraud insurance companies. Although the indictment listed, by way of illustration, some of the means used to execute the fraud, it was not necessary that the government prove each act or representation in the indictment. It was sufficient that the evidence show merely the existence of a fraudulent scheme and one or more mailings in furtherance of that scheme. *Anderson*

v. *United States*, 369 F. 2d 11, 15 (C.A. 8), certiorari denied, 386 U.S. 976; *Henderson* v. *United States*, 425 F. 2d 134, 139, n. 5 (C.A. 5). "[T]he existence of surplusage in the indictment will not affect the validity of a conviction." *United States* v. *Hyde*, 448 F. 2d 815, 839 (C.A. 5), certiorari denied, 404 U.S. 1058.

2. Petitioner claims error in the district court's refusal of his proffer of an expert medical witness who would have refuted Dr. Becker's statement that petitioner's clients were hospitalized unnecessarily. As the court of appeals correctly pointed out, however (Pet. App. 15-17), the issue was whether the patients were hospitalized unnecessarily in the view of Dr. Becker, who was the only physician they consulted at the time of the events in question. Accordingly, subsequent *ad hoc* analysis of the patients' medical needs by another medical expert could have no bearing on petitioner's good faith at the time he referred his clients to Dr. Becker. The proffered testimony was, therefore, wholly irrelevant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10